

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
MARSHALL DIVISION**

NETLIST, INC.,)	
)	
Plaintiff,)	
)	Case No. 2:22-cv-293-JRG
vs.)	
)	JURY TRIAL DEMANDED
SAMSUNG ELECTRONICS CO, LTD;)	(Lead Case)
SAMSUNG ELECTRONICS AMERICA,)	
INC.; SAMSUNG SEMICONDUCTOR)	
INC.,)	
)	
Defendants.)	

NETLIST, INC.,)	
)	
Plaintiff,)	
)	Case No. 2:22-cv-294-JRG
vs.)	
)	JURY TRIAL DEMANDED
MICRON TECHNOLOGY, INC.;)	
MICRON SEMICONDUCTOR)	
PRODUCTS, INC.; MICRON)	
TECHNOLOGY TEXAS LLC,)	
)	
Defendants.)	

**PLAINTIFF NETLIST, INC.'S REPLY IN SUPPORT OF ITS MOTION FOR
SUMMARY JUDGMENT ON MICRON'S AFFIRMATIVE DEFENSES
(DKT. 366)**

Micron does not respond to Netlist's statement of undisputed facts as required under Local Rule CV-56, and as such does not dispute any of those facts. For this reason alone, summary judgment should be granted in Netlist's favor.

I. Netlist Is Entitled to Summary Judgment on Micron's Affirmative Defenses Nos. 6 and 13 (License and Covenant Not to Sue and Exhaustion)

Micron does not dispute that it failed to identify any facts supporting these defenses in response to Netlist's interrogatories. Instead, Micron claims it produced information in an exhibit to an interrogatory response in the -203 case, that "the parties have an agreement to be able to cross-reference discovery between the -203 and -294 matters," and that its non-infringement expert identified the defense as well. Opp. at 2-3. This is wrong for multiple reasons.

First, Micron's counsel expressly **excluded** cross-use of written interrogatory responses. Specifically, Micron's counsel stated [REDACTED]

[REDACTED] [REDACTED] Ex. 11 (McCullough Oct.

25, 2023 Email). Because this was Micron's only purported evidence produced during fact discovery in support of its alleged license defense, the Court should grant Netlist's motion.

Second, Micron does not dispute that it never actually identified a purported license in fact discovery. Micron bears the burden to prove that an effective license exists and covers the patents-in-suit. *CXT Sys., Inc. v. Acad., Ltd.*, 2020 WL 9936134, at *4, 5 (E.D. Tex. Jan. 30, 2020) (citing Fed. R. Civ. P. 8(c)(1)). Micron also bears the burden to prove an affirmative defense of exhaustion. Micron points to the December 21, 2023, **rebuttal** report of its expert Dr. Stone as alleged support for this defense. But even if Micron could avoid its obligations to produce relevant evidence during the fact discovery period by relying on its experts, it would have needed to do so with its **opening** report, as Micron bears the burden on this affirmative defense. See Third DCO, Dkt. 205 at 3 (identifying November 20, 2023, as the deadline to "Serve Disclosures

for Expert Witnesses by the Party with the Burden of Proof”). Micron’s failure to provide evidence of any purported license in support of its affirmative defenses in discovery or opening expert reports requires exclusion, and summary judgment should be granted in Netlist’s favor.

II. Netlist Is Entitled to Summary Judgment on Micron’s Laches Defense (No. 16)

Micron incredibly argues that it has a live affirmative defense of laches as to the ’417 Patent. Opp. at 3-5. This is the first time Micron has ever identified such a defense.

Micron’s Answer provides 33 paragraphs of allegations in support of its Affirmative Defense No. 16, which is directed entirely to the **’912 Patent**. Dkt. 122 at ¶¶ 18-51.¹ Micron does not mention the ’417 Patent anywhere in that affirmative defense, at most providing the bare recitation that [REDACTED]

[REDACTED] *Id.*, ¶ 18.

Micron never provided any notice it was raising a laches defense as to the ’417 Patent in discovery. Netlist’s Interrogatory No. 14 expressly asked Micron to “Set Forth Your Complete Basis for your affirmative defenses.” Dkt. 364-05 at 17. [REDACTED]

[REDACTED]. Exs. 12 and 13. Nowhere in discovery did Micron ever identify that it would raise a prosecution laches defense as to the ’417 Patent. Indeed, Micron’s invalidity expert does not raise a prosecution laches defense in his opening report. Dkt. 366-06.

Summary judgment is appropriate because Micron failed to identify any basis for a prosecution laches defense as to the ’417 Patent at any point in fact or expert discovery. *Zenith Elecs. LLC v. Vizjo, Inc.*, 2010 WL 11475581, at *3 (E.D. Tex. July 13, 2010). Netlist would be severely prejudiced if Micron were permitted to raise such a defense now—after failing to provide any basis for such a defense—as Netlist’s experts have had no opportunity to analyze the issue.

¹ In its opposition, Micron does not dispute that summary judgment is warranted on its laches defense for the ’912 Patent. Summary judgment should thus be granted as to the ’912 Patent.

Dated: February 7, 2024

Respectfully submitted,

/s/ Jason G. Sheasby

Samuel F. Baxter
Texas State Bar No. 01938000
sbaxter@mckoolsmith.com
Jennifer L. Truelove
Texas State Bar No. 24012906
jtruelove@mckoolsmith.com
MCKOOL SMITH, P.C.
104 East Houston Street Suite 300
Marshall, TX 75670
Telephone: (903) 923-9000
Facsimile: (903) 923-9099

Jason G. Sheasby (*pro hac vice*)
jsheasby@irell.com
Annita Zhong, Ph.D. (*pro hac vice*)
hzhong@irell.com
Andrew J. Strabone (*pro hac vice*)
astrabone@irell.com
Thomas C. Werner (*pro hac vice*)
twerner@irell.com
Yanan Zhao (*pro hac vice*)
yzhao@irell.com
Michael W. Tezyan (*pro hac vice*)
mtezyan@irell.com

IRELL & MANELLA LLP
1800 Avenue of the Stars, Suite 900
Los Angeles, CA 90067
Tel. (310) 277-1010
Fax (310) 203-7199

Attorneys for Plaintiff Netlist, Inc.

CERTIFICATE OF AUTHORIZATION TO FILE UNDER SEAL

I hereby certify that the foregoing document and exhibits attached hereto are authorized to be filed under seal pursuant to the Protective Order entered in this Case.

/s/ Yanan Zhao
Yanan Zhao

CERTIFICATE OF SERVICE

I hereby certify that, on February 7, 2024, a copy of the foregoing was served to all Micron counsel of record via Email as agreed by the parties.

/s/ Yanan Zhao
Yanan Zhao